Gana Muthusamy v LM Ong & Co

COURT OF APPEAL — CIVIL APPEAL NO J-04-61 OF 1997
GOPAL SRI RAM, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA
2 MAY 1998

Legal Profession *— Professional discipline — Misconduct — Standard of conduct to be applied — Whether for members of the Bar to decide what amounts to misconduct according to standards established by members of the profession — Whether courts must exercise caution when dealing with cases on unprofessional conduct — When court will be entitled to interfere*

Legal Profession *— Professional discipline — Misconduct — Wrongful appropriation of rental sum as mesne profits in the absence of judgment in client's favour — Whether merely guilty of error of judgment not amounting to professional misconduct*

The appellant — an advocate and solicitor — represented a landlord of certain premises in Johor Baru ('the landlord'). The landlord had commenced an action against the tenant in the sessions court. While that action was still pending, the respondents — who represented the tenant —paid to the appellant a sum of RM520 as rental. The appellant's receipt, however, treated that sum as payment of mesne profits. The respondents protested and argued that the appellant ought to accept the payment as rent or return it; he could not unilaterally elect to treat it as mesne profits in the absence of a judgment in the landlord's favour. The appellant stood his ground. The respondents complained to the Disciplinary Committee. The committee found the appellant guilty of conduct unbecoming of an advocate and solicitor. The High Court affirmed the decision of the committee. Hence, the appeal to this court. Counsel for the appellant argued that his client was merely guilty of an error of judgment not amounting to professional misconduct.

Held, dismissing the appeal:

(1) It is beyond comprehension how the appellant could have deemed it proper to appropriate the payment in question to account of mesne profits in the absence of a finding by the sessions court in the landlord's favour. The appellant's conduct, therefore, leaves no room for the suggestion that there was a mere error of judgment on his part (see p 344G–H).

(2) It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise, it will be the court and not the profession that will determine the yardstick of professional behaviour. Therefore, a court will be entitled to interfere only if

what has been found by a Disciplinary Committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails (see pp 344I and 345C).

Obiter:

It is doubtful whether appeals against the decision of the High Court under s 103E of the Legal Profession Act 1976 would lie to this court and not directly to the Federal Court. Therefore, it is probable that this appeal has not been properly brought before this court and this court may lack jurisdiction to entertain it altogether (see p 345F).

[**Bahasa Malaysia summary**

Perayu yang merupakan peguambela dan peguamcara — telah mewakili tuanpunya tanah sesuatu premis tertentu di Johor Bahru ('tuanpunya tanah tersebut'). Tuanpunya tanah tersebut telah memulakan satu tindakan terhadap penyewa dalam mahkamah sesyen. Sementara tindakan itu masih menanti penyelesaian, penentang-penentang — yang mewakili penyewa — telah membayar kepada perayu satu jumlah sebanyak RM520 sebagai sewaan. Resit perayu, walaubagaimanapun menganggapkan jumlah itu sebagai pembayaran hasil-hasil perantaraan. Penentang-penentang telah membantah dan berhujah bahawa perayu seharusnya menerima pembayaran sebagai sewaan atau mengembalikannya; beliau tidak boleh secara sepihak memilih untuk menganggapkannya sebagai hasil-hasil perantaraan dalam ketiadaan penghakiman yang memihak kepada tuanpunya tanah. Perayu telah tidak berganjak daripada alasannya. Penentang-penentang telah mengadu kepada Jawatankuasa Tatatertib. Jawatankuasa itu mendapati perayu bersalah atas kelakuan yang tidak wajar dari seorang peguambela dan peguamcara. Mahkamah Tinggi telah mengesahkan keputusan Jawatankuasa tersebut. Oleh yang demikian menyebabkan rayuan kepada Mahkamah Tinggi. Peguam bagi pihak perayu berhujah bahawa anakguamannya hanya bersalah atas kesilapan penghakiman yang tidak membawa kepada salah-laku profesional.

Diputuskan, menolak rayuan:

(1) Ianya di luar dugaan bagaimana perayu boleh menganggapkannya wajar untuk menyesuaikan pembayaran yang dipersoalkan itu kepada akaun hasil-hasil perantaraan dalam ketiadaan keputusan oleh mahkamah sesyen yang memihak kepada tuanpunya tanah. Kelakuan perayu dengan itu tidak memberikan ruang untuk saranan bahawa cuma terdapat suatu kesilapan pertimbangan sahaja di pihaknya (lihat ms 344G–H).

(2) Ianya penting bagi ahli-ahli Badan Peguam untuk memutuskan apa yang dikatakan membawa kepada kelakuan yang tidak wajar bagi seseorang peguambela dan peguamcara dalam keadaan-keadaan tertentu, menurut standard yang ditetapkan oleh ahli-ahli profesion yang dihormati itu. Mahkamah-mahkamah semestinya berhati-hati ketika melayan sesuatu rayuan dalam mana persoalan utama adalah sama ada perlakuan yang khusus adalah tidak profesional dan kes-kes yang wajar mendapat percampuran curial jarang ditemui. Sebaliknya, ianya merupakan mahkamah dan bukan profesion itu yang akan menentukan pengukur kelakuan profesional. Dengan itu, sesebuah mahkamah hanya boleh mencampuri jika apa yang telah diputuskan oleh sesuatu Jawatankuasa Tatatertib sebagai kelakuan tidak profesional tidak akan dianggapkan sedemikian oleh ahli-ahli profesion itu yang paling bijak. Kes semasa tidak berada dalam lingkungan ujian itu dan sehubungan itu rayuan ini gagal (lihat ms 344I and 345C).

Obiter:

Ianya diragui sama ada rayuan-rayuan terhadap keputusan Mahkamah Tinggi di bawah s 103E Akta Profesyen Undang-Undang 1976 akan dikekalkan pada mahkamah ini dan tidak secara langsung kepada Mahkamah Persekutuan. Dengan itu, ianya berkemungkinan bahawa rayuan ini telah tidak dikemukakan menurut aturan di hadapan mahkamah ini dan mahkamah ini mungkin ketiadaan bidangkuasa untuk melayannya sama sekali (lihat ms 345F).]

Notes

For cases on miscoduct, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras1538–1594.

Legislation referred to

Courts of Judicature Act 1964 s 103E
Legal Profession Act 1976

Appeal from: Civil Appeal No 12–36 of 1992 (High Court, Johor Bahru)

N Chandran (*R Jayabalan* with him) (*Gana Muthusamy & Co*) for the appellant.

Serene Ong (*LM Ong & Co*) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): The appellant is an advocate and solicitor. He was found guilty of misconduct unbecoming of an advocate and solicitor by the Disciplinary Committee. He appealed to the High Court. His appeal was dismissed. He then appealed to this

court. We heard his appeal on 16 February 1998 and dismissed it. The reasons for our decision are as follows. A

The facts relevant to this appeal are not in dispute. The appellant practises under the name and style of Gana Muthusamy & Co. At all material times, the appellant represented the landlord of certain premises in Johor Baru. The tenant was represented by M/s LM Ong & Co, a firm of advocates and solicitors. They are the respondents to this appeal. The landlord commenced an action against the tenant in the sessions court. While that action was still pending, the respondents, on 30 March 1989, paid to the appellant a sum of RM520 as rental for the months of April and May 1989. The appellant's receipt, however, treated that sum as payment of mesne profits. So did his letter under the cover of which he sent the receipt to the respondents. There then followed an exchange of correspondence between the parties. The respondents protested at the appellant's appropriation of the sum of RM520 as mesne profits. They took the position that the appellant ought to accept the payment as rent or return it: he could not unilaterally elect to treat it as mesne profits in the absence of a judgment in the landlord's favour. The appellant stood his ground. Later, upon the respondents' complaint, the matter went before the Disciplinary Committee. After inquiring into the matter, that committee found that the appellant was guilty of conduct unbecoming of an advocate and solicitor. It censured the appellant, but made no order as to costs. The High Court, on the appellant's appeal, affirmed the decision of the Disciplinary Committee. B C D E

Before us, En Chandran of counsel for the appellant argued that his client was merely guilty of an error of judgment not amounting to professional misconduct. We do not agree.

The respondents sent him the money in question as payment of rental. If the appellant was not minded to receive the payment for the purpose for which it was sent, he ought to have rejected it. Instead, he appropriated the money for a purpose other than the purpose for which it was sent. The evidence shows that the appellant had sufficient opportunity to repent and put matters right by refunding the payment to the respondents. Instead, he was adamant in contending that what he had done was entirely proper. It is beyond comprehension how the appellant could have deemed it proper to appropriate the payment in question to account of mesne profits in the absence of a finding by the sessions court in the landlord's favour. The appellant's conduct, therefore, leaves no room for the suggestion that there was a mere error of judgment on his part. We consequently find ourselves in agreement with the conclusions of the Disciplinary Committee and the learned judges of the High Court. F G H

It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will I

A determine the yardstick of professional behaviour. We would, in this context, express our agreement with the following passage in the *Guide to the Professional Conduct of Solicitors* issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:

B > One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.

In our judgment, a court will be entitled to interfere only if what has been C found by a Disciplinary Committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

There is one other point. It was not raised by either side during argument. However, it occurred to us while preparing this judgment in D draft. It has to do with whether we had jurisdiction in the first place to entertain this appeal.

Section 103E of the Legal Profession Act 1976 provides that any person aggrieved by the decision of the High Court shall have the right to appeal to the Supreme Court within one month of the decision of the High E Court. In 1994, when this court was established by the Federal Constitution, the Courts of Judicature Act 1964 was amended in relation to appeals from the High Court. The amending legislation also provided that references in the Constitution to the Supreme Court were to be to the newly established Federal Court. The Legal Profession Act was not, however, amended. F Hence, it may be argued that appeals against the decision of the High Court under s 103E of the Legal Profession Act now lie, not to this court, but directly to the Federal Court. We must therefore express our doubt as to whether this appeal has been properly brought before this court as we may lack jurisdiction to entertain it altogether.

For the reasons already given, the appeal was dismissed. However, we G made no order as to costs and directed that the deposit be refunded to the appellant.

Appeal dismissed.

H Reported by Loo Lai Mee

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